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THIRTEENTH JUDICIAL DISTRICT
STATE OF MONTANA

ORIGINAL FILED

December 23 2010

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

RUSSELL C. FAGG

DISTRICT JUDGE-DEPARTMENT 2

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December 22, 2010

Chief Justice Mike McGrath
Justice Brian Morris
Justice James C. Nelson
Justice W. William Leaphart
Justice Patricia O'Brien Cotter
Justice James A. Rice
Justice Mike Wheat
Montana Supreme Court
Room 323, Justice Building
215 N. Sanders
P.O. Box 203003
Helena, Montana 59620-3003

Re: LSR Rules

Montana Supreme Court Justices:

The purpose of this letter in support of the LSR Rules is to address Ethics Opinion 101216. As you know, I have already made extensive comments supporting the rules themselves. I'd like to just briefly discuss the advisory-only Ethics Opinion pertaining to the rules.

The Ethics Committee first asks whether the proposed rule changes are necessary to meet the stated goal of the court. On the one hand, they are not, as the current Rules of Professional Conduct allow for limited scope representation. However, the proposed rules are helpful in providing "safe harbors" and "best practices" to practicing attorneys. For instance, having the Limited Scope Representation Agreement in writing is very important so all parties concerned (including the Court) can know exactly what representation is covered and what representation is not covered. See *Proposed Rule Changes to Rule 1.2*.

It very much concerns the undersigned the Ethics Committee believes the proposed rule changes would lead to a "second tier of representation." The proposed rules will not lead to reduced competency standards in representation. Having said that, if the Montana Supreme Court does not believe the change suggested to Rule 1.1 regarding competence needs to be changed, then that would not significantly affect the goal of the LSR changes.

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The Ethics Opinion also believes the Proposed Rule Change amendment to Rule 11 “invites sub-standard attorney work and increased invalid filings.” I do not believe that is correct, nor would it be the outcome of the proposed rule change. Of course, Rule 11 allows so-called ghost-writing, without requiring a signature on the pleading, motion or document. This is the crux of the biggest complaint with these rule changes. The Montana Ethics Committee is at odds with the ABA formal opinion regarding this topic. Obviously, this is a question of opinion. California has allowed ghost-writing for twenty years, and the general consensus (from both practitioners and courts alike) is the rule allowing ghost-writing works well in California. This is a pretty good track record which the Montana Supreme Court should consider in ruling on this important issue.

Last, the Ethics Opinion does not believe the Proposed Rule Changes are consistent with the traditional functions of a lawyer. With due respect to the hard-working members of the Ethics Committee, this complaint looks to be one that boils down to simple resistance to change in our judicial system. Rather than diminishing or devaluing a lawyer’s counsel, LSR could in fact enhance a lawyer’s value. With LSR, a client can now go to a lawyer in cases where they otherwise would not have been able to seek limited advice. Primarily due to economic reasons, many litigants would undoubtedly like to see an attorney but cannot afford an attorney. With LSR firmly established, these same litigants can now seek an attorney’s advice and counsel on a limited basis for the most important of their issues. For instance, in a family law case (which will probably see the predominant use of LSR) a litigant might decide he or she can divide all their personal property and debts between the parties, but wish assistance in preparing a QDRO for a retirement plan or would like assistance developing the all-important Parenting Plan. With LSR, the litigants could have the attorney focus in on either the QDRO or the Parenting Plan, thus making sure those important components are correct, and doing the rest of the dissolution themselves. This would be a good example of the value of an attorney’s service, although limited to the most important topics.

In the end analysis, whether the LSR rules are adopted as proposed, adopted with amendments, or not adopted, it will probably not change the landscape of the Montana Judicial system to a tremendous degree. However, I firmly believe adopting the LSR rules will benefit: 1) Montana practitioners (some of whom will see an increase in business, albeit small and have safe harbors to protect them when performing LSR); 2) Montana courts (who will receive better prepared documents); and, most importantly 3) Montana litigants (who will have more opportunities to get limited representation to stretch their funds). I would urge your adoption of the rules as proposed.

Sincerely,


Russell C. Fagg
District Court Judge